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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In re: **DEANNA KATHLEEN GARDNER,** **DEBTOR.**	**CASE NO. 00-42099-13** **CHAPTER 13**
In re: **GARY DARNELL GREEN,** **DEBTOR.**	**CASE NO. 00-42076-13** **CHAPTER 13**
In re: **LEANA RACHELE WRIGHT,** **DANIEL RAY WRIGHT,** **DEBTORS.**	**CASE NO. 00-42043-13** **CHAPTER 13**

ORDER CONCERNING REQUEST FOR SANCTIONS FOR INCLUDING IN A PLAN A PROVISION FOR AN UNDUE HARDSHIP DISCHARGE OF STUDENT LOANS

These matters are before the Court for a written ruling on creditor Educational Credit Management Corporation's assertion that debtors and their counsel can always be sanctioned for including in a chapter 13 plan a provision similar to the one involved in the Tenth Circuit's decision in *Andersen v. UNIPAC-NEBHELP (In re Andersen)*, 179 F.3d 1253 (10th Cir. 1999). Debtors Deanna Kathleen Gardner, Leana Rachele Wright, and Daniel Ray Wright are represented by counsel Michael F. Brunton. Debtor Gary Darnell Green is represented by counsel Fred W. Schwinn. The Educational Credit Management Corporation ("ECMC") is represented by counsel N. Larry Bork. The Court announced its decision in open court on December 20, 2000, and supplements its findings and conclusions with this written decision.

FACTS

There are no material facts in dispute.

In these cases, the debtors submitted chapter 13 plans that created a special class of unsecured student loan creditors, and provided that repayment of those debts would impose an undue hardship on the debtors and their dependents, so any amount not paid through the plan would be discharged. If ECMC had not timely objected to the plans, confirmation would likely have barred it from later questioning the dischargeability of its debts, assuming the debtors successfully completed their plans. In proposing the plans, the debtors' counsel were relying on the decision in *Andersen* that a similar plan provision had that effect.

ECMC contends that the plan provisions concerning the student loans violated the Bankruptcy Code, and that the Court should declare that debtors and their counsel can be sanctioned for submitting a plan containing such a provision. It is not currently seeking sanctions in these cases, but seeks a declaratory judgment so that such provisions would be sanctionable in future cases.

DISCUSSION AND CONCLUSIONS

Student loan debts are generally excepted from the effect of a chapter 13 discharge. *See* 11 U.S.C.A. §1328(a)(2) and §523(a)(8). However, student loan debts become dischargeable under §523(a)(8) if "excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor or the debtor's dependents." Under this provision, the debtor has the burden of proving the existence of an undue hardship. *Woodcock v. Chemical Bank*, 45 F.3d 363, 367 (10th Cir. 1995). Federal Rule of Bankruptcy Procedure 7001(6) provides that "a proceeding to determine the dischargeability of a debt" is an adversary proceeding governed by the rules of Part VII of the

Bankruptcy Rules. (Except where otherwise indicated, future references to "Rule" or "Rules" are to the Federal Rules of Bankruptcy Procedure.) ECMC contends that an undue hardship discharge can never be obtained in any way without the debtor filing an adversary proceeding and proving the existence of an undue hardship. The Tenth Circuit's decision in *Andersen* makes clear that this absolute approach is not correct.

In *Andersen*, a chapter 13 debtor proposed a plan providing that she would pay ten percent of all her allowed unsecured claims, including certain student loan claims, and that confirmation of her plan would constitute a finding, pursuant to §523(a)(8), that excepting the student loan debts from the discharge would impose an undue hardship on her and her dependents, making the balance of the debts dischargeable. 179 F.3d at 1254. The student loan creditor filed an objection to the plan that was denied as untimely, the plan was confirmed, and the creditor failed to appeal either ruling. *Id*. The debtor completed her plan payments and received a discharge. *Id*. Then, ECMC, as the successor holder of the student loan debts, tried to collect from the debtor. *Id*. at 1254-55. The debtor reopened her bankruptcy case to seek a determination that the debts had been discharged. *Id*. at 1255. The bankruptcy court ruled that the debts were not discharged because the debtor had not obtained a formal judicial determination of undue hardship, but the Tenth Circuit Bankruptcy Appellate Panel reversed, and ECMC appealed. *Id*. The Tenth Circuit said: "[I]n light of [ECMC's predecessor's] repeated failure to timely and properly challenge Andersen's plan during the course of the bankruptcy proceedings, along with the res judicata effect of the confirmed plan and strong policy favoring finality, we hold that the balance of Andersen's student loan debt is discharged pursuant to the confirmed plan and the order of discharge." *Id*. at 1259.

The Bankruptcy Code does not establish procedures that must be followed to obtain either a determination of the debtor's entitlement to an undue hardship discharge of a student loan debt, or confirmation of a plan. *See, e.g.*, §523(a)(8); §1325; §1328(a). Instead, the Rules, promulgated pursuant to the Supreme Court's power under 28 U.S.C.A. §2075, establish the procedures. As that statute says, the Rules cannot "abridge, enlarge, or modify any substantive right." As previously indicated, Rule 7001(6) declares that "a proceeding to determine the dischargeability of a debt" is an adversary proceeding. Rule 3015(f) provides that an objection to confirmation creates a contested matter governed by Rule 9014.

While some seem to attach great significance to the differences between an adversary proceeding and a contested matter, this Court cannot. When plans such as those in these cases are proposed, an affected student loan creditor can object, as ECMC did, to the procedure the debtor chose for alleging entitlement to an undue hardship discharge of the student loan debt, but could choose instead to object only to the undue hardship allegation itself. By objecting to the procedure, the creditor can force the debtor to file an adversary proceeding pursuant to Rule 7001(6). However, if the creditor objects only to the substantive allegation, the ensuing dispute could continue as a contested matter.[1] In either case, the litigation would proceed in essentially the same manner. Unless the court orders otherwise (a power this Court rarely uses), the same discovery Rules apply in contested matters as in adversary proceedings. *See* Rule 9014 (Part VII Rules 7026 and 7028-7037 apply to contested

[1]While the Court might have some obligation to require the filing of an adversary proceeding when a fee would have to be paid, debtors are exempted from the adversary filing fee. *See* 28 U.S.C.A. §1930(b) & Appendix ¶6.

matters). The Rules about dismissal, findings by the court, judgments, default, and summary judgment also apply unless the court orders otherwise. *See id*. (Part VII Rules 7041, 7052, and 7054 to 7056 apply to contested matters).

At least under the practice before this Court, the notice that a creditor is given of the time by which it must object to a chapter 13 debtor's plan and of the hearing on confirmation of the plan is functionally equivalent to the notice it would be given of the commencement of an adversary proceeding and its time to file an answer. The notices about the plan objection deadline and the confirmation hearing are included in the notice of the commencement of the case and of the time set for the meeting of creditors sent by the Bankruptcy Noticing Center. Rule 3015(d) requires the notice of the plan objection deadline and the confirmation hearing to include the plan or a summary of the plan; in the vast majority of cases filed here, the plan is filed with the petition and the plan or summary is included in the case commencement notice. In those few cases where the plan is filed later, practically all of them are filed within the fifteen days after the petition was filed, as allowed by Rule 3015(b), and a local rule requires the debtor or the debtor's attorney to serve the plan with notice of the plan objection deadline and confirmation hearing. *See* D.Kan. LBR 3015(b).1. Pursuant to Rule 2002(b), creditors must be given at least twenty-five days notice by mail of the time to object to and the hearing on confirmation. In fact, in cases before this Court, because the confirmation hearing is scheduled to occur at least twenty days after the meeting of creditors held pursuant to §341(a), which must be scheduled between twenty and fifty days after the petition is filed, *see* Rule 2003(a), creditors will always have at least forty

days after the petition is filed to object to a chapter 13 plan.[2] Because plans are ordinarily filed with the petition and sent with the notice of commencement of the case, the creditors will have most of that period to review and object to the plan. In those few cases where the plan is filed on the last day of the fifteen-day period allowed by Rule 3015(b), the creditors will already know when their objections are due and will still have a twenty-five day period to review the plan and decide whether to object.[3] This is essentially the same as the time a creditor is given to answer an adversary complaint. In adversary proceedings, a summons and a copy of the complaint are ordinarily served on the defendant by first-class mail, and the mailing must be done within ten days after the summons was issued. Rule 7004(b) & (e). The defendant's answer is then due thirty days after the summons was issued, except the United States, its agencies, and officers have thirty-five days to answer. Rule 7012(a). So the creditor has anywhere from twenty to thirty days to respond to an adversary complaint.

The only significant difference between the documents mailed to a creditor to give notice of the plan objection deadline and confirmation hearing, and those mailed to commence an adversary proceeding is that a summons is included for the adversary proceeding. The summons must notify the defendant that the failure to appear and defend will result in a default judgment for the relief demanded in the complaint. *See* Fed. R. Civ. P. 4(a) (made applicable in adversary proceedings by Rule

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[2]Although the notices sent say plan objections are due fifteen days before the confirmation hearing, this Court actually treats as timely any that are filed up to the time the confirmation hearing is held. *See* Rule 3015(b) (objection to confirmation shall be filed and served "before confirmation of the plan").

[3]Even if the Court enforced the deadline for plan objections stated in the notice of fifteen days before the confirmation hearing, the creditors would have twenty-five days' notice of their objection deadline, and ten days to review the plan.

7004(a)). The notice that a chapter 13 bankruptcy case has been filed is sent to all creditors identified in the debtor's petition and similarly informs the creditors that the debtor's chapter 13 plan will not be effective until confirmed by the court, and that they may object to the plan and appear at the confirmation hearing. A copy (or a summary) of the plan is sent with this notice, except in those few cases where the plan is filed after the petition. In those cases, the plan is to be mailed with a separate notice of the time to object and the date of the confirmation hearing. *See* D. Kan. LBR 3015(b).1. So long as the plan clearly informs the student loan creditor that the debtor is trying to obtain a discharge of its debt, the notice and plan serve a function similar to the summons. Like the summons, they provide the "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections" that is necessary to provide the creditor with constitutional due process. *Mullane v. Central Hanover Bank and Trust* 339 U.S. 306, 314 (1950) (citations omitted); *see also Creditors Committee v. Samuels (In re Park Nursing Center)*, 766 F.2d 261, 262-64 (6th Cir. 1985) (service of summons and complaint by first class mail to commence adversary proceeding in bankruptcy case did not violate defendant's due process rights); *Belford v. Martin-Trigona (In re Martin-Trigona)*, 763 F.2d 503, 505 (2d Cir. 1985) (service by first class mail was effective to give court personal jurisdiction over defendants in bankruptcy adversary proceeding).

ECMC complains that a debtor is excused from proving undue hardship if plans like the ones proposed in these cases are confirmed without objection. While this is true, the same thing can happen in an adversary proceeding in which the defendant student loan creditor fails to file an answer. In each situation, the debtor obtains the relief requested by default, and is not required to present evidence of

undue hardship. Indeed, the creditor's failure to object to a plan or answer a complaint might mean that the creditor agrees the debtor is entitled to the relief requested. This is simply not a reason to bar undue hardship provisions from chapter 13 plans. In either situation, the creditor can force the debtor to prove undue hardship by objecting to the plan or answering the adversary complaint.

ECMC also contends that allowing such undue hardship provisions to be included in chapter 13 plans invites debtors and their counsel to include them in bad faith when no undue hardship even arguably exists in hopes of slipping them by inattentive or unsuspecting creditors. The Court is unwilling to assume that debtors and their counsel will include such provisions when they have no basis in fact, and instead assumes they are aware that when they include an allegation of undue hardship in a plan filed with the Court, they are certifying that to the best of their "knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,— . . . (3) the allegations and other factual contentions have evidentiary support." Fed. R. Bankr. P. 9011(b). If their certification is false, they are subject to appropriate sanctions. Fed. R. Bankr. P. 9011(c).

ECMC asks the Court to follow the reasoning of the courts in *In re Hensley*, 249 B. R. 318, 320-23 (Bankr. W.D. Okla. 2000), and *In re Evans*, 242 B.R. 407, 409-13 (Bankr. S.D. Ohio 1999), and declare that including an "*Andersen*" provision in a plan is always sanctionable. The Court declines this invitation. The *Hensley* and *Evans* courts seem to view the filing of an adversary proceeding as absolutely essential to any kind of undue hardship declaration. As indicated above, this Court believes the procedure for commencing and resolving a contested matter started by a plan objection is sufficiently similar to the procedure for resolving an adversary proceeding that either procedure suffices for obtaining an undue hardship determination. The Court can agree with *Hensley*

on one point, however. That court stated that at a hearing on the matter, "it was clear to the Court that debtors' counsel included these plan provisions in the hope that they would trap an unwary student loan creditor." 249 B.R. at 320. As indicated above, this use of the plan proposal and confirmation procedure is improper. To the extent the *Hensley* court's ruling was based on this aspect of the cases before it, this Court has no quarrel with it. However, to the extent it was based on the procedural difference between the plan confirmation process and an adversary proceeding, the Court disagrees with it.

The Court does note that *Evans* involved a circumstance not involved here, namely that the student loan creditor was the United States Department of Education. 242 B.R. at 408-09. In an adversary proceeding, such a government agency is protected by a special provision concerning service of process. Rule 7004(b)(4) & (5). Similar special provisions protect the government when notices must be sent to it as a creditor. *See* Rule 2002(j)(4) (concerning notice the United States or its agencies as a creditor (other than for taxes)); Standing Order No. 99-2 of the Bankruptcy Court for the District of Kansas (about noticing various agencies of the United States (including the Internal Revenue Service) as a creditor). Under all these provisions, both adversary proceeding process and bankruptcy case commencement notice to the United States are to be sent to the same places, except that the summons and complaint in an adversary proceeding are also to be served on the Attorney General in Washington, D.C. Since the government is not involved in the cases now before the Court, the Court need not decide whether this difference should mean that an undue hardship discharge provision in a plan can never be effective against the United States or its agencies in the absence of service of the notice of the plan objection deadline and confirmation hearing date on the Attorney General.

As a final matter, this Court has previously ruled orally in another case, *see Innes v. United States Department of Education (In re Innes)*, Case No. 95-41486, Adversary No. 95-07104, pleading #72, Courtroom Minute Sheet for hearing held Aug. 7, 1997, that it is ordinarily premature to rule on the undue hardship question at or near the time of confirmation of a chapter 13 plan. The debtor will not be entitled to a discharge until he or she completes payments under the plan, and that almost always takes at least three years, and can take up to five years. *See* §1328(a); §1325(b)(1)(B); §1322(d). Until plan completion, an undue hardship determination would be at least something of an advisory opinion. Furthermore, the undue hardship determination requires the Court to predict the future income and expenses of the debtor and the debtor's dependents, always a difficult task. Waiting until the debtor becomes, or at least soon will be, entitled to a discharge gives the Court three to five more years of actual experience to consider in making that decision. In addition, while a debtor performs under a plan, his or her income and expenses are typically more closely monitored and documented than they were before the bankruptcy filing, providing a much better evidentiary foundation for the soothsaying required to resolve the undue hardship question.

The only time the Court might be willing to decide, at or near the time of confirmation, whether the debtor will be entitled to an undue hardship discharge of student loan obligations would be if the debtor's financial situation is almost certain to remain unimproved for the foreseeable future. These circumstances could probably exist only if the debtor will be unable to obtain better-paying employment because of some permanent disability, and there is also little reason to expect the debtor's expenses to decrease sufficiently in the future to make repayment of the student loan possible. Consequently, the Court is convinced that, in nearly all factual circumstances, seeking an undue hardship determination at

the time of confirmation is inappropriate, and therefore, including an *Andersen* provision in a plan would likewise be inappropriate. In effect, including such a provision in a plan constitutes an allegation that excepting the debt from discharge will impose an undue hardship on the debtor and the debtor's dependents under the circumstances that will exist in three to five years, not under those at the time the plan is proposed. Debtors and their counsel can properly include *Andersen* provisions in chapter 13 plans only when it is reasonable to make such an allegation.

To the extent ECMC objects to the debtors' attempts to obtain undue hardship determinations through the plan confirmation process, its objections are sustained. To the extent ECMC seeks a per se rule that sanctions will be imposed for using that procedure, its objections are denied.

IT IS SO ORDERED.

Dated at Topeka, Kansas, this _____ day of February, 2001.

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JAMES A. PUSATERI
CHIEF BANKRUPTCY JUDGE